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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

Number 349

■

DAISY LARGENT
Petitioner

v.

JACK REEVES, CITY MARSHAL
Respondent

■

Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

HAYDEN C. COVINGTON
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To the SUPREME COURT OF THE UNITED STATES:

Daisy Largent, petitioner, presents this her petition for writ of certiorari and shows unto the Supreme Court of the United States the following:

A

Summary Statement of Matters Involved

1. *Preliminary Statement.*

With this petition are filed two companion cases, *Mrs. John Hilley, petitioner,* v. *Wid Spivey, Sheriff, Respondent,* and *Tully B. Killam, petitioner,* v. *City of Floresville, respondent,* brought here also from the Court of Criminal Appeals of Texas. The city ordinances under which petitioners were convicted are essentially different in their terms. The Comanche ordinance in the *Hilley* case is a

license tax law. The Floresville ordinance in the *Killam* case prohibits and makes unlawful peddling of literature on the public square and on any street within the city, being a prohibitionary and not a regulatory ordinance, and does not provide for issuance of license or permit. The Paris ordinance in this case is also prohibitionary, prohibiting the sale of literature at all times in the main business sections of the city of Paris. Section 3 of the ordinance in question makes unlawful and prohibits absolutely selling, offering for sale or even the exchange without price of any character of property, including literature containing information and opinion on the public square, known as the Plaza, and also on streets adjacent thereto. This includes all of the main streets of the city of Paris running from east to west and from north to south being twelve streets that "run into" and are adjacent to the Plaza or public square of the city. This includes all of the streets of the city where one would be able to contact the most people on Saturdays and evenings who come to the business section of the city for various purposes. There is little or no difference between this ordinance and the one involved in the *Killam* case (companion to this case). This ordinance is void on its face for the same reason as is the ordinance involved in the *Killam* case.

There is a common question in all three companion cases: That is the arbitrary, discriminatory denial of the writ of habeas corpus, contrary to the Fourteenth Amendment to the United States Constitution, and the common question of a fictitious and colorless non-federal question, which is intermingled with the federal question. These common questions make it appropriate to consider these three cases together. It is here requested that the Court read and consider the petition filed in this case, with supporting brief, together with the petitions and supporting briefs filed in the two above named companion cases. Although different disposition may be made in each of the three cases, it would

conserve time of the Court to consider the three together.

The ordinance here involved, as construed by the Texas courts, is identical with the ordinance involved in Numbers 13, 18 and 29, October Term 1939 in the case of *Schneider* v. *State,* 308 U. S. 147, and the holding of the Court of Criminal Appeals that the ordinance is valid on its face contradicts directly the holding by this Court in *Schneider* v. *State,* supra.

Under the practice allowed and established by the Court of Criminal Appeals of Texas, habeas corpus cases in a conviction of this sort are reviewable by the Court of Criminal Appeals if the ordinance is unconstitutional on its face, as construed by the Texas courts. It is admittedly unconstitutional and void on its face, under the *Schneider* case, supra, therefore the purported non-federal question relied upon in the Court of Criminal Appeals in the disposition of this case is fictitious and resorted to for the sole purpose of denying petitioner her constitutional rights, in violation of the equal protection and due process clauses of the Fourteenth Amendment.

2. *Statutory Provision Sustaining Jurisdiction.*

Section 240(a) of the Judicial Code, 28 U. S. C. A. 347(a) sustains jurisdiction.

3. *Validity of the City Ordinance and the State Statute Drawn in Question.*

The ordinance in question is Ordinance No. 922 of the City of Paris, Texas,[1] which reads as follows:

> "*Section 1.* Be it ordained by the City Council of the City of Paris that the original Public Square as the same appears from donation to the town of Paris and the Plaza thereof is hereby designated as the Plaza.
>
> "*Section 2.* That the lots and blocks embraced in the territory bounded on the south by the North boundary

[1] The City of Paris is a town of 18,678 population in northeastern Texas, 12 miles from Red River, the boundary line between Oklahoma and Texas, located in the black land, cotton farm district of Texas.

line of Sherman street, on the West by the East boundary line of 19th street, on the north by the South boundary line of Austin street, and on the east by the West boundary line of 20th street within the corporate limits of the City of Paris is hereby designated the Market Square.

"*Section 3.* It shall hereafter be unlawful for any person to sell, barter, exchange, or offer for sale, barter or exchange, any character of property whatever on the Plaza or streets adjacent thereto. The Plaza may be used subject to regulation and control by the Mayor and Police Department for the purpose of parking vehicles, and in order to avoid confusion, congestion and interference with traffic, the Police Department may by proper marking designate space for parking purposes.

"*Section 4.* That the Market Square be and the same is hereby dedicated to the use of producers of farm, garden, and orchard products, live stock, poultry, eggs, milk and butter under such regulations as may now be in force, as are herein provided or may hereafter be provided. Such sales shall be made from the vehicles by which such products are conveyed to the market square and by the Owner thereof or his Agent. Use of the space upon the Market Square for the purpose herein provided shall be prohibited except between the hours of 5 o'clock A.M. and 8:00 P.M., in order that the City may keep said Market Square in a neat, clean and sanitary condition.

"*Section 10.* Any person violating any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor and upon conviction in the Corporation Court shall be subject to a fine in an amount of not less than FIVE DOLLARS, nor more than ONE HUNDRED DOLLARS."

R. 8-10.

The State statute, the validity of which is drawn in question, is Article 53 of the Code of Criminal Procedure of Texas, 1925, reading as follows:

> "The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases. This article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court or county court at law, in which the fine imposed by the county court or county court at law shall not exceed one hundred dollars."

4. *Date of Judgment and Order to be Reviewed.*

The order remanding petitioner to custody was affirmed by judgment of the Court of Criminal Appeals entered on April 8, 1942. (R. 35) Petitioner duly filed her motion for rehearing on April 17, 1942 (R. 36) and judgment overruling the motion was duly entered on June 3, 1942. (R. 49) Time for filing petition for certiorari expires September 3, 1942. Petition is filed within such time.

5. *Time and Manner in which Questions Raised Below.*

In the application for writ of habeas corpus, petitioner alleged she was illegally restrained of her liberty. R. 1.

Under the law of Texas this particular allegation, without further statements, draws into question directly the constitutionality of the ordinance or law under which petitioner is held.[2]

At the habeas corpus hearing the state's attorney stated, with the approval of the district judge hearing the applica-

[2] *Ex parte Calhoun,* 91 S. W. 2d 1047; *Ex parte Travis,* 123 Tex. C. R. 480, 473 S. W. 483, 489; *Ex parte Cox,* 53 Tex. C. R. 240, 109 S. W. 369; *Ex parte Mato,* 19 Tex. C. R. 112; *Ex parte Cain,* 56 Tex. C. R. 538, 120 S. W. 999; *Ex parte Walsh,* 59 Tex. C. R. 409, 129 S. W. 118; *Ex parte Patterson,* 42 Tex. C. R. 256, 58 S. W. 1011.

tion: "The sole question is whether or not it is a valid ordinance." (R. 12, 16) Petitioner's attorney at the time evidence was offered stated that the evidence was offered for the sole purpose of showing the invalidity of the ordinance and that the petitioner was engaged in the activity of "sale of literature" and that any ordinance, regardless of how it is worded, that prohibits her right in doing that, is void. (R. 12) The court permitted the petitioner to introduce evidence for those purposes. R. 12.

The court permitted the *Watchtower* and *Consolation* magazines to be offered in evidence in proof of the activity of petitioner. R. 17.

In the Court of Criminal Appeals, under Propositions One and Two, petitioner attacked section 3 of the ordinance on its face because it prohibited the distribution of literature or the sale thereof, in excess of police power, which makes unlawful that which is, per se, lawful, and deprives petitioner of her right of freedom of press, contrary to the Fourteenth Amendment to Federal Constitution. R. 20, 21.

See footnote, page 22, infra.

Section 4 of the ordinance was expressly attacked under Proposition 4 in the Court of Criminal Appeals because it was void on its face in that it discriminated and conferred special privileges, contrary to the equal protection clause of the Fourteenth Amendment. R. 21.

Under Proposition 3 the entire ordinance was attacked as construed and applied because it denied and deprived petitioner of her rights of freedom of speech, press and worship, contrary to the Fourteenth Amendment. R. 21.

The Court of Criminal Appeals considered these federal questions above presented with reference to the claimed invalidity of the ordinance on its face, but as to the contention that the ordinance was unconstitutional and void as applied, they held that they did not have jurisdiction to consider said question. The federal questions were considered as properly presented as far as time and manner of raising

them was concerned in the trial court.[3] The questions were properly presented in the trial court in conformity with the Texas procedure in habeas corpus cases, and the questions were therefore sufficiently raised in the trial court and the Court of Criminal Appeals to require consideration by this Court. *People of New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 66-69, 70-71.

When the *so-called* non-federal question was injected into the case by the holding of the Court of Criminal Appeals that they did not have jurisdiction to consider the question of whether or not the ordinance was unconstitutional as construed and applied, petitioner filed her motion for rehearing, attacking, under grounds 3 and 5, Article 53 of the Code of Criminal Procedure of Texas, alleging that such statute, as construed and applied, denied her the inalienable right of the writ of habeas corpus, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The motion for rehearing timely presented this question. *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U. S. 673-675, 677-678.

6. *Opinions of the Courts Below.*

The trial courts did not render or file opinions. The Court of Criminal Appeals' opinion and dissenting opinion of Judge Graves, are reported in 162 S. W. 2d 419.

See Record, pages 24-35.

7. *Statement of Facts.*

The pertinent parts of the complaint charging petitioner with an alleged violation of the foregoing ordinance read as follows:

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[3] In Texas a constitutional question can be raised at any time and in any manner. *City of Amarillo* v. *Tutor,* 267 S. W. 697, 199 S. W. 352; *Hoffman* v. *State,* 20 S. W. 2d 1057; *Burnes* v. *State,* 75 Tex. C. R. 188, 170 S. W. 550; *Gohlman,* etc. v. *Whittle,* 273 S.W. 808. Texas Jur., Vol. 9, page 469.

"With force and arms did unlawfully offer for sale literature upon the Plaza of the City of Paris, Lamar County, Texas, within the corporate limits of the City of Paris, in violation of Ordinance 922 of the Ordinances of the City of Paris, Texas."

R. 5.

There are other allegations in the complaint but they are immaterial in view of the fact that petitioner was charged only with violation of Section 3 of Ordinance 922. At the trial in the District Court, the state's attorney stated that petitioner was arrested and imprisoned on a charge of violation of section 3 of ordinance Number 922. R. 13.

At the habeas corpus hearing before the District Court the ordinance was introduced in evidence. (R. 7-10, 17, 18) The capias profine on the judgment, assessing fine of $100 plus $13.20 costs, was offered in evidence. (R. 3, 4, 10) Judgment of the Corporation Court rendered upon the verdict, finding the petitioner guilty as charged, and assessing fine of $1.00, was offered in evidence. (R. 10,11) The warrant for arrest was introduced in evidence R. 11.

J. T. Evans, Jr., Recorder of the Corporation Court, testified that Daisy Largent was tried in Corporation Court on the 29th day of April, 1941, for distributing literature in or about and adjacent to the Plaza by offering for sale, literature; that she was charged with distributing, and offering for sale, literature in a prohibited area. (R. 11, 12) He identified the *Watchtower* magazine as one of the pamphlets distributed, which magazine was introduced in evidence. This is the same publication as that distributed by Mrs. John Hilley in one of the companion cases on the streets of Comanche, Texas. We have described the nature of this publication in the petition for writ of certiorari filed in the *Hilley* case and here refer to such description, page 7 of such petition for certiorari.

Jack Reeves, city marshal of Paris, testified that Daisy

Largent was in jail on June 10, 1941, when capias profine was served upon her. R. 15.

Daisy Largent testified that she was distributing, as an ordained minister of Jehovah God and one of Jehovah's witnesses, the *Watchtower* and *Consolation* magazines on the Plaza and streets adjacent to the Plaza. R. 16.

At the conclusion of the hearing the District Judge entered an order remanding petitioner to the custody of respondent to which action petitioner excepted and gave notice of appeal to the Court of Criminal Appeals and thereafter appeal was perfected to said Court of Criminal Appeals.

On November 17, 1941, petitioner's appeal was argued before the Court of Criminal Appeals, together with three companion cases involving Jehovah's witnesses, appealed to said Court in habeas corpus proceedings from the County Courts of Kerr, Comanche, Wilson and Lamar counties. There petitioner contended that the ordinance was unconstitutional and void both on its face and as construed and applied, because it discriminated and conferred special privileges, and denied petitioner of her rights of freedom of assembly, speech, press and worship, all contrary to the Fourteenth Amendment to the United States Constitution. The appeal in one of the companion cases, styled *Ex parte J. D. Carter* (156 S. W. 2d 986) from Kerr County Court, was reversed, the writ of habeas corpus granted, and relator Carter discharged, because the State statute under which he had been convicted was found to be unconstitutional on its face.

The Court of Criminal Appeals' disposition of the questions presented in this case is not based on an independent, non-federal ground, but the action of such court is a manifest subterfuge to avoid the decision of the federal question and to add to the denial of petitioner's rights. See footnote, page 22, infra. See decision on non-federal ground contained in the petition for writ of certiorari filed in companion case

of Daisy Largent. The majority opinion of the Court of Criminal Appeals intermingles the purported non-federal question to such an extent that it is dependent entirely upon the disposition of the federal question involved as to make necessary a review by this Court. That court holds that if the ordinance is unconstitutional on its face, then it has jurisdiction to consider and determine the question. That court found the ordinance to be valid on its face under the Federal Constitution. This makes necessary a review of the entire case.

B

Questions Presented

By reason of the foregoing, there were seasonably presented to the courts below and there now are presented to this Court for review substantial federal questions as follows:

1) Is the ordinance in question unconstitutional and void on its face because it is in excess of the police power and makes unlawful that which is, per se, innocent and lawful, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution?

2) Is the ordinance in question unconstitutional and void on its face because it denies and deprives petitioner of her right of freedom of the press in that it prohibits "press activity" on the main streets of the city, contrary to the First and Fourteenth Amendments to the United States Constitution?

3) Is the ordinance in question unconstitutional and void as construed and applied because it denies petitioner of her rights of freedom of speech, press and worship, contrary to the First and Fourteenth Amendments to the United States Constitution?

4) Is the ordinance in question unconstitutional and void on its face because it discriminates and confers special privileges upon one class of citizens and denies the same

privileges to other persons similarly situated, contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution?

5) Does Article 53 of the Code of Criminal Procedure of Texas, 1925, as construed and applied by the Court of Criminal Appeals of Texas, unduly deny petitioner of her right to the inalienable and inherent writ of habeas corpus in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

6) Did the Court of Criminal Appeals of Texas err in affirming the judgment of the trial court, remanding petitioner to custody of respondent?

C

Reasons Relied on for Allowance of Writ

This petition for writ of certiorari should be granted in sound discretion of this Court because the Court of Criminal Appeals and the trial court have decided important questions of constitutional law in a manner not applicable to and in conflict with decisions of this Court in the cases of *Schneider* v. *State,* 308 U. S. 147, and *Hague* v. *C. I.O.,* 307 U. S. 496, 501, 518. The ordinance in question is unconstitutional because it is an outright prohibition of the right to distribute literature containing information and opinion "in appropriate places." *Schneider* v. *State,* supra. See also *Ex parte Faulkner,* 158 S. W. 2d 525.

It is to be noticed that in the cases of *Ex parte Slawson,* 141 S. W. 2d 609, 610, *Ex parte Lewis,* 147 S. W. 2d 478, *Ex parte Jones,* 81 S. W. 2d 706, and *Ex parte Spelce,* 119 S. W. 2d 1033, 1037, that the Court of Criminal Appeals did not hold that it did not have jurisdiction. On the contrary, the matter of the contentions advanced were discussed and the cases were decided on their merits. The judgment here

entered disposed of the case on the merits and not on jurisdictional grounds; therefore the entire discussion of the opinion to the effect that the court does not have jurisdiction is immaterial, since the judgments of the trial courts were affirmed holding that petitioner was not denied her liberty in violation of the Constitution.

The questions presented as to the validity of the ordinance in question and the right to the writ of habeas corpus are of national importance and seriously affect the fundamental civil rights and personal rights of every person in the United States. The Court of Criminal Appeals has so far departed from the accepted and usual course of judicial procedure and decided an important federal question in such an arbitrary and "off hand" manner as to call for the exercise of this Court's power of supervision to halt the same.

As further reasons why this petition for writ of certiorari should be granted, we refer to the entire dissenting opinion of Judge Graves of the Court of Criminal Appeals in the case at bar, and make the same a part hereof as though copied at length herein. See the Record in this petition for certiorari, pages 28-35.

The ordinance on its face includes literature and therefore on its face and by its terms prohibits the distribution of literature within the business district of Paris and therefore is unconstitutional and void on its face and in direct conflict with the holding of this Court as to ordinances involved in Numbers 13, 18 and 29, October Term 1939, in *Schneider* v. *State,* supra, and *Hague* v. *C. I. O.,* supra.

It should be noticed that the ordinance here is prohibitionary and not regulatory.

We further make reference to the petition for writ of certiorari filed in the companion case of *Hilley* v. *Spivey.*

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Court of Criminal Appeals of Texas directing such court to certify to this Court for review and determination on a day certain to be therein

named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the decree of the said court affirming the judgment of the trial court be reversed and the judgments of the trial court be reversed and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

DAISY LARGENT
Petitioner

By HAYDEN C. COVINGTON
117 Adams Street
Brooklyn, New York

Attorney for Petitioner

SUPPORTING BRIEF

Specification of Errors

The petitioner assigns the following errors in the record and proceedings of said cause:

The Court of Criminal Appeals of Texas committed fundamental error in affirming the judgment of the trial court because

1) The ordinance in question is unconstiutional and void on its face because it is in excess of the police power and makes unlawful that which is, per se, innocent and lawful, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

2) The ordinance in question is unconstitutional and void on its face because it denies and deprives petitioner of her right of freedom of the press in that it prohibits "press activity" on the main streets of the city, contrary to the First and Fourteenth Amendments to the United States Constitution.

3) The ordinance in question is unconstitutional and void as construed and applied because it denies petitioner of her rights of freedom of speech, press and worship, contrary to the First and Fourteenth Amendments to the United States Constitution.

4) The ordinance in question is unconstitutional and void on its face (Sec. 4) because it discriminates and confers special privileges upon one class of citizens and denies the same privileges to other persons similarly situated, contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution.

5) Article 53 of the Code of Criminal Procedure of Texas, 1925, as construed and applied by the Court of Criminal Appeals of Texas, unduly denies petitioner her inalienable and inherent right to the writ of habeas corpus, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

The Court of Criminal Appeals and the trial courts have so construed this ordinance as to include within the terms, "any character of property whatever", literature containing information and opinion; thereby the ordinance is void on its face and unconstitutional.

It is a fundamental proposition that the streets of villages, towns and cities are dedicated to public welfare; that no particular person or class of persons can be denied the use thereof for any lawful or constitutional purpose. The proper rule was laid down by this Court in *Schneider* v. *State,* 308 U. S. 147, as follows:

> "Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.
>
> "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. . . .
>
> " . . . Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. . . .
>
> " . . . But as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

See also *Hague* v. *C. I. O.,* 307 U. S. 496, 501, 518, where this

Court said: "But it must not in the guise of regulation be abridged or denied." See also *Thornhill* v. *Alabama,* 310 U. S. 88; *Carlson* v. *California,* 310 U. S. 106.

The fact that the petitioner was charged with selling literature in the prohibited area does not change the rule, for the right of free press is not limited to "free of charge" distribution upon the streets, but extends to literature sold or for which contributions are received. The ordinance in question here goes further and prohibits the exchange of literature.

It is not a regulatory ordinance as to time and place, nor is it contended that petitioner occupied any part of the sidewalk or public streets to the exclusion of all others, but the undisputed evidence simply shows that she walked about the streets distributing by hand the literature in question.

The statement made by Mr. Justice Reed in the *Jones* v. *City of Opelika,* 62 S. Ct. 1231, case is appropriate here, "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, a fortiori, invalid."

Even when applied to commercial peddling of ordinary articles of merchandise the ordinance in question comes clearly within the prohibition of the above named cases and there is no valid reason that can be advanced to sustain the validity of the ordinance. See Freund's "The Police Power", page 133.

But if it be assumed that under ordinary application, the ordinance be proper exercise of the police power, it is not justification for prohibition of the sale of literature, because then it runs counter to the Constitution. As this Court said in *Schneider* v. *State,* supra, such regulation might be valid when directed at ordinary business, but invalid when directed against the exercise of rights so vital to the maintenance of democratic institutions. See also *Eubank* v. *Richmond,* 226 U. S. 137, *Southern Railway Co.* v. *Virginia,* 290 U. S. 190, *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission,* 294 U. S. 613, 622, where it was held that

the police power of a State has its limits and must stop when it encounters the prohibitions of the Federal Constitution.

The prohibition of the use of the streets is unconstitutional because constitutional guarantees cannot be made to yield to mere convenience. *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402.

The State cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. *Smith* v. *Texas*, 233 U. S. 630.

A municipal ordinance, which narrows the limits within which gas works may be erected and maintained so as to exclude from the privileged territory property purchased for that purpose and on which such works were being erected, constitutes an arbitrary and unjustifiable interference with property rights where such change is not demanded by the public welfare. *Dobbins* v. *Los Angeles*, 195 U. S. 223.

In *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25, this Court said:

> "The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local government agency acting under the sanction of State legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on acknowledged police powers of a State, must always yield in case of conflict with the processes under the Constitution, or with any right which that instrument gives or secures." [4]

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[4] *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinot* v. *Davenport*, 22 How. 227, 243; *Missouri, K. & T. Ry. Co.* v. *Baber*, 169 U. S. 613, 626.

Although the ordinance does not, within its prohibitive terms, expressly name all the main streets that extend from the business section to the city limits, nevertheless, by including within its prohibitive terms all the streets that are adjacent to the Plaza, that has been accomplished, because all the main streets of Paris and places where one would likely desire to exercise press activity would be on such streets adjacent to the Plaza and not in the out-of-the-way streets that are desolate of travelers. The streets near the Plaza include all the entire business district and which are the only places within the limits of the city where people come in great numbers to shop, attend theaters, make purchases on the market and do other business at nighttime and particularly all day Saturday and Saturday night. It is at such times that one desiring to disseminate information and opinion would exercise his press activity. If he is denied the right to exercise such activity in or around the Plaza, then he in fact has been denied the right to exercise such right within the city, for one would not desire to stand on a desolate street corner in the residential area, where only few or no people pass, to distribute literature. In fact, the officials of the City of Paris have stated, 'These named "appropriate places" are denied you for the purpose of exercising your liberty because "it may be exercised in some other place" such as in the unused residential area and other places in the city which are not frequented by visitors.' This is exactly what was condemned by this Court in *Schneider* v. *State,* supra.

The Court of Criminal Appeals admits that if the ordinance was invalid on its face, it was their duty to reverse the judgment of the District Court and order the writ granted and the relator discharged. In fact this was done in the companion case of *J. D. Carter,* 156 S. W. 2d 986, where the identical activity as carried on by petitioner here was the basis of the conviction there. The ordinance in question is a bald, outright prohibition and arbitrary denial of

the proper and legal use of the streets for the purpose of dissemination of information and opinion.

The *so-called* non-federal question is fictitious and colorless and without foundation in fact or law and the holding on the procedural question is in direct conflict with *Ex parte Lewis,* 45 Tex. C. R. 1, 73 S. W. 811; *Ex parte Faulkner,* 158 S. W. 2d 525; *Ex parte Baker,* 78 S. W. 2d 610; *Ex parte Spelce,* 119 S. W. 2d 1033, 1037; *Ex parte Slawson,* 141 S. W. 2d 609, 610; *Ex parte J. D. Carter* (one of Jehovah's witnesses and companion case to this in the Court of Criminal Appeals), 156 S. W. 2d 986; *Ex parte Roquemore,* 131 S. W. 1101; *Ex parte Jones,* 81 S. W. 2d 706; *Ex parte Patterson,* 58 S. W. 1011, 42 Tex. C. R. 256. See footnote, p. 22.

Judge Hawkins, speaking for the majority of the Court of Criminal Appeals, makes the statement that if petitioner was dissatisfied with the findings of fact of the Corporation Court she should have availed herself of an appeal to the County Court from the Corporation Court. This statement is impertinent and immaterial because the petitioner claimed throughout that the ordinance is unconstitutional and void both on its face and as construed and applied and she does not complain as to the findings of fact because the undisputed evidence showed that she was engaged in an activity protected by the Constitution and that the ordinance as construed deprived her of that right. In these circumstances and under the prevailing practice of Texas, if the ordinance was unconstitutional for any reason, it was unnecessary that she appeal to the County Court but she had the right to apply immediately to the District Court for writ of habeas corpus. See the foregoing cases last cited and the dissenting opinion of Judge Graves of the Court of Criminal Appeals in this case. R. 28-35.

Furthermore this rule announced by Judge Hawkins, even when his reasoning is followed as to the appropriateness of the habeas corpus remedy to question constitutionality as construed, would not apply, if this Court reaches the

conclusion that the ordinance in question is unconstitutional on its face. In that event the writ should be granted, says Judge Hawkins.

On the question of jurisdiction of this Court and to show that the holding of the Court of Criminal Appeals is not based on an independent, adequate, non-federal question, but that such *so-called* non-federal question is intermingled with the constitutional rights of petitioner and is also colorless and fictitious and arbitrary holding and evasive of the real issue.[5]

In this, as well as companion cases of *Ex parte Killam* and *Ex parte Hilley* in the Court of Criminal Appeals (also brought to this Court as companion cases on petitions for writ of certiorari) it is significant that the Court of Criminal Appeals did not dismiss the appeals for want of jurisdiction, as it would have done under the prevailing practice, had that court seriously believed that it did not have jurisdiction. If an appellate court does not have jurisdiction, as contended by the Court of Criminal Appeals, it would be obligated to sustain the motion to dismiss the appeal made by the State's Attorney in these cases. On the contrary, that court ignored the State's Attorney's motion to dismiss and affirmed the judgments of the trial courts in the three cases, remanding the petitioners to custody, thereby showing that the Court of Criminal Appeals considered the cases on the merits and that the *so-called* non-federal question is absolutely colorless and fictitious. The trial courts decided the cases on the merits and held the ordinances constitutional and found petitioners had not been denied their constitutional rights. The Court of Criminal Appeals affirmed the holding of the trial courts, therefore it cannot be said that the disposition

[5] See the following cases: *People ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 66-69, 70-71; *Rogers* v. *Alabama*, 192 U. S. 226, 230, 231; *Davis* v. *Wechsler*, 263 U. S. 22, 24; *Love* v. *Griffith*, 266 U. S. 32; *New York Central Ry. Co.* v. *New York & Pennsylvania*, 270 U. S. 124, 126, 127; *German Savings & Loan Soc.* v. *Dormitzer*, 192 U. S. 125, 128; *Postal Tel. Cable Co.* v. *Newport*, 247 U. S. 464, 473, 475-476; *Brown* v. *Mississippi*, 297 U. S. 278; *Patterson* v. *Alabama*, 294 U. S. 600, 603-607.

made of these three cases is based on an adequate non-federal question.

We make reference to and incorporate herein the argument made in the supporting brief of each of the companion cases styled *Hilley* v. *Spivy* and *Killam* v. *Floresville.*

Because the matter is *exactly in point,* we here call attention to the case of *Ex parte Walrod,* 120 P. 2d 783, an original habeas corpus action—decided by the Criminal Court of Appeals of Oklahoma Dec. 23, 1941, where that court had before it for review the case of one of Jehovah's witnesses who had been unlawfully imprisoned and restrained of his liberty in the city jail of Stillwater, Oklahoma, for the alleged violation of Ordinance No. 611 of that city, holding unlawful the distribution of literature "on the streets and sidewalks of the congested business district of the City of Stillwater, Oklahoma, and said congested business district is defined as being the territory included from Fifth avenue to Eleventh avenue and between Hudson Street and Lewis Street." There the Criminal Court of Appeals, in discharging petitioner, held the ordinance to be unconstitutional and void under the First and Fourteenth Amendments to the Constitution of the United States because such ordinance denied the rights of freedom of the press, speech and worship, being a prohibition of and direct burden on such rights.

See also *Ex parte Winnett et al.,* 121 P. 2d 312, also an original habeas corpus action decided by the Criminal Court of Appeals of Oklahoma on January 7, 1942, where four of Jehovah's witnesses were restrained of their liberty in the city jail of Shawnee, Oklahoma, for the alleged violation of an ordinance of that city prohibiting the distribution of literature of any kind at any time on the streets of the city of Shawnee. Here the Criminal Court of Appeals likewise rightly found such ordinance unconstitutional and void, being an outright denial of freedom of speech, press and worship guaranteed by the Constitution of the United States and discharged petitioners.

What is here done by the Court of Criminal Appeals of Texas and the District Court of Lamar County in construing the terms of the ordinance in question to be valid and to include the distribution of literature containing information and opinion, has for its basis the same reasoning that was employed by this Court in the majority opinion in *Jones* v. *City of Opelika,* supra. The courts below in this case hold that one who "sells" literature can be denied his constitutional rights.

The courts below admit that an ordinance is invalid on its face when expressly prohibiting the distribution of literature free and without charge, but hold that when an ordinance prohibiting selling, bartering, or exchanging "any character of property whatever" is wrongly construed and applied to one engaged in distributing literature it is valid.* *This is a distinction,* without a difference. The ordinance here, on its face, and as its terms are construed by the courts below, expressly prohibits absolutely the exercise of fundamental personal rights within the business district of the city of Paris.

If the Court finds that this ordinance is unconstitutional on its face, and as its terms have been construed, then, a fortiori, according to the admission of the Court of Criminal Appeals, that court should have considered the application for writ of haeas corpus.

If the holding of the Court of Criminal Appeals is sustained, then an increased burden of appeals to this Court becomes necessary in cases involving Jehovah's witnesses from the 254 counties of Texas, because of the action of the Court of Criminal Appeals in attempting to escape and avoid its responsibility under the Constitutions of Texas

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* Compare Court of Criminal Appeals words in *Ex parte Baker,* 127 Tex. C. R. 589, 78 S. W. 2d 610, 613, to wit: "It is a familiar rule that the validity of an act is to be determined not alone by its caption and phraseology, but also by its practical operation and effect." In this case the writ was sustained.

and the United States, to protect rights secured by the United States Constitution to its citizens in Texas.

The ordinance is clearly invalid on its face and for this reason the judgment of the Court of Criminal Appeals should be reversed.

If the argument presented herein (together with that presented in the companion cases of *Hilley* v. *Spivey* and *Killam* v. *City of Floresville*) is given thoughtful consideration by the Court, the conclusion will be inescapable that this Court has jurisdiction and that the petition for certiorari should be granted and the judgment and decision of the Court of Criminal Appeals of Texas should be set aside and held for nought.

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under 240(a) of the Judicial Code, 28 U. S. C. A. 347(a) and Rule 38, par. 5, of this Court. To that end this petition for writ of certiorari should be granted so as to correct the errors complained of committed by, and the judgments rendered by, the Court of Criminal Appeals and the trial courts, against petitioner.

Respectfully submitted,

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